

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JUST NEW HOMES, INC. and	:	CIVIL ACTION
D. RICHARD TONGE	:	
	:	
v.	:	
	:	
BEAZER HOMES, PULTE HOMES,	:	
TOLL BROTHERS, et al.	:	NO. 05-04198-JF

MEMORANDUM AND ORDER

Fullam, Sr. J.

January 22, 2007

By Memorandum and Order dated November 28, 2005, I denied plaintiffs' motion for preliminary injunction in this alleged antitrust case, and directed that a pending defense motion to dismiss would be considered as a motion for summary judgment, based on the evidence presented at the preliminary injunction hearing and such additional evidence as the parties might wish to submit. The summary judgment record now establishes the following facts:

In 1996, at a meeting of the defendant Home Builders Association of Bucks and Montgomery Counties, the persons in attendance voted to approve a proposed form dealing with procedures for determining whether brokers representing purchasers of new homes were entitled to share in the commissions on sales of new homes. The form was adopted after some consultation with local real estate brokers. Home builders subscribing to the use of the form would agree that a broker representing the buyer of a new home would share in the real

estate commissions only if the broker accompanied the buyer in visiting the property before the sale. Plaintiff, on the other hand, would prefer an arrangement whereby brokers representing buyers could simply register their clients with the home builder in advance of the buyer's inspection of the property - registration which could be accomplished by mail, telephone, or a certification by the buyer in advance of the sale.

Plaintiff has brought this action, as a putative class action, charging that the defendants have engaged, and are engaging in, a conspiracy to violate the antitrust laws, by insisting that a buyer's broker is not entitled to share in the commission on the sale unless the broker accompanies the buyer to the property - i.e., a "physical presence" requirement. Plaintiff, and his expert witness, contend that this represents a concerted agreement to refuse to deal with brokerage firms which primarily deal, on a nationwide basis, through the internet in obtaining information about new houses available for sale.

I consider it unnecessary to decide whether their interpretation of the antitrust laws is correct - plaintiff is not in competition with the defendant home builders; identifying the appropriate market is somewhat dubious; and it does not appear that the defendants' alleged activities can be said to have caused an injury which the antitrust laws were intended to prevent. But I am satisfied that the defendants' motion for

summary judgment should be granted because of the absence of proof that any of the defendants participated in a conspiracy. The undisputed evidence establishes that the form in question amounted merely to a suggestion, adoption of which was entirely voluntary on the part of each builder. While plaintiff has shown that, on occasion, he was advised that he or one of his salesmen would have to be physically present at the property in order to share in a commission, there is no evidence of concerted action or a standard, widespread practice. Plaintiff has shown merely that, on occasion, he was advised that he could not share in a commission unless he or a representative accompanied the proposed purchaser to the property. The evidence is entirely consistent with the notion that, if any of the defendants chose to adopt the "physical presence" requirement, it was merely their way of satisfying themselves that the purchaser's broker had earned a share of the commission.

Moreover, it bears mention that plaintiff did not establish his firm or enter into the real estate business until several years after the challenged practice was supposedly initiated. Any contention that the defendants were attempting to injure plaintiff or any other online broker (there were none at the time) seems farfetched. Plaintiff may be correct in arguing that sellers of new homes and their selling brokers would be benefitted by familiarizing themselves with the increased

availability of pertinent information through online brokers. If so, market forces will presumably result in changed attitudes. But none of the defendants has been shown to have impeded the operation of market forces. On this record, each of the defendants has a right to act independently to advance their own perceived self-interest.

For the foregoing reasons, plaintiffs' antitrust claims cannot succeed. Plaintiffs' state-law claims (conversion, tortious interference and civil conspiracy) will also be dismissed. Indeed, plaintiff has not expressed any opposition to dismissal of the state-law claims.

An Order follows.

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ORDER

AND NOW, this 22nd day of January 2007, upon
consideration of defendants' motion for summary judgment and
plaintiffs' response, IT IS ORDERED:

1. Defendants' motion for summary judgment is
GRANTED.
2. This action is DISMISSED with prejudice.
3. The Clerk is directed to close the file.

BY THE COURT:

/s/ John P. Fullam
John P. Fullam, Sr. J.